Dato' Mohamad bin Shahul Hameed v Datin Mazita bt Osman

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO C-02(NCvC)(W)-655–04 OF 2021
ABDUL KARIM, GUNALAN MUNIANDY AND AZIMAH OMAR JJCA
25 JULY 2023

Contract — Agreement — Partnership agreement — Appellant claimed against respondent for allegation of breach — Whether appellant's claim was statute-barred pursuant to s 6 of Limitation Act 1953 — Whether there was agreement whereby appellant was entitled to 50% of profit-loss sharing — Whether respondent was not privy to oral agreement and thus not bound by its terms — Whether learned judge erred for reliance on testimony

This was an appeal against the decision of the learned judge of the High Court ('LJ') in dismissing the appellant's claim against the respondent. Both the appellant and respondent were advocates and solicitors who were at the material time partners in the Kuantan branch of the legal firm, Messrs Mohd Mohtar & Co ('MM & Co'). The legal firm of MM & Co was incorporated by the founding partner, Hj Mohd Mohtar ('PW7') around 1998. Thereafter, MM & Co opened up branches in Kuantan, Kemaman and Kuala Lumpur. The Kuantan branch was established and managed by Dato' Suffian ('DS') who was also the respondent's husband around the year 2000. The respondent joined around the year 2001 and the appellant joined around the year 2002 after he resigned from MBF Finance Bhd. Around the year 2010, DS was offered a position in the Prime Minister's office. He then left the Kuantan branch of MM & Co and was substituted by the respondent as a partner in the Kuantan branch. The appellant was paid monthly drawings from the Kuantan branch which amounted to RM1,000 initially in 2002 and was gradually increased to RM4,500 till September 2017. The respondent served the appellant a memorandum together with a copy of the profit and loss statement for year 2016, stating that the appellant received payment in excess of RM39,468.93 based on the distribution of the profit and loss from the Kuantan branch for 2016. The respondent then sent to the appellant a letter informing the appellant of the cessation of monthly drawings commencing October 2017. The appellant responded with a letter stating that the 70%-30% stake as agreed in the draft partnership agreement was only effective from 2017 upon its execution and objected to the unilateral cessation of the monthly drawings and insisted on his 50% share of the shareholding. The respondent then ceased paying the appellant drawings in October 2017 and therefore was alleged to have breached the terms of the partnership agreement. It resulted in this suit being filed by the appellant for breach of contract. The respondent: (a) denied that the appellant was a partner of MM & Co Kuantan

branch and asserted that the respondent owned 100% of the Kuantan firm's equity; and (b) claimed that she was appointed by DS who was a partner of the Kuantan firm at the material time. The LJ in dismissing the claim held that the appellant was not a partner at MM & Co Kuantan branch and therefore, not entitled to 50% of the profit and loss. Hence, this appeal.

Held, allowing the appeal:

(1)Section 6 of the Limitation Act 1953 was inapplicable as the suit was commenced less than a year after the cause of action arose and crystallised in 2017. The LJ's finding was misconceived as the terms of the oral agreement subsisted when the respondent was appointed a partner of MM & Co. It was the alleged breach by the respondent of these terms that the appellant's cause of action was predicated upon (see para 25).

(2)The sharing of profits involving the appellant was supported and evidenced by undisputed documentary evidence. There was clear, unequivocal and incontrovertible evidence regarding the appellant's partnership with his stake (though the percentage was disputed) at MM & Co Kuantan branch. In light of the documents in support that the appellant tendered, the respondent's oral evidence would appear to be in conflict with the contemporaneous documents, in which case, in principle the contemporaneous documentary evidence would take precedence. As the respondent had come on board as a replacement for DS, there was a binding legal partnership relationship between the appellant and her until mutual cessation of the partnership. The respondent should be estopped from now belatedly asserting the non-existence of the alleged contract (see paras 44–46 & 48–49).

(3)There was, ample evidence before the court below that the terms of arrangement between the appellant and DS was maintained as evidenced by the continued payment of monthly drawings to the appellant who was also paid profits for the year 2016. It followed that the respondent as the succeeding partner in place of DS was indeed privy to the outcome of the agreement between the then existing partners who had agreed to the subsistence of the appellant as an equal partner as evidenced by the continuation of the monthly drawings and payment of profits. The LJ's view in support of his decision that the appellant's action was misplaced because it ought to be against DS and not the respondent was misconceived as the cause of action only accrued upon the alleged breach by the respondent when she decided to terminate the monthly drawings to the appellant effective October 2017 at which time DS was no longer a party to the then prevailing terms of arrangement between the appellant and the respondent that enabled the partnership at the Kuantan branch to subsist (see paras 54–55).

(4)The reliance on PW7's testimony was flawed as PW7's testimony was on the whole incoherent on material facts and more importantly, he was, admittedly, not involved in the affairs of the Kuantan branch nor in the discussions between the appellant and DS on the profit-sharing percentage. The respondent's testimony that PW7 managed the Kuantan branch after DS left the firm was in direct contradiction with the testimony of PW7 himself that he was not involved in the Kuantan branch. His evidence on the issue at hand which was seriously disputed was, thus, unreliable and not worthy of much weight. The LJ had failed to critically evaluate and appreciate material aspects of the evidence that tilted in favour of the truth of the appellant's assertion that he was a partner of the Kuantan branch of MM & Co holding a 50% equity and not a salaried

legal assistant as claimed by the respondent (see paras 56–57 & 60). A

[Bahasa Malaysia summary

Ini adalah rayuan terhadap keputusan hakim Mahkamah Tinggi yang bijaksana ('HMT') dalam menolak tuntutan perayu terhadap responden. Kedua-dua perayu dan responden adalah peguam bela dan peguam cara yang merupakan rakan kongsi di firma guaman cawangan Kuantan, Tetuan Mohd Mohtar & Co ('MM & Co'). Firma guaman MM & Co telah diperbadankan oleh rakan pengasasnya, Hj Mohd Mohtar ('PW7') sekitar tahun 1998. Selepas itu, MM & Co membuka cawangan di Kuantan, Kemaman dan Kuala Lumpur. Cawangan Kuantan telah ditubuhkan dan diuruskan oleh Dato' Suffian ('DS') yang juga suami responden sekitar tahun 2000. Responden telah menyertai sekitar tahun 2001 dan perayu menyertai sekitar tahun 2002 selepas beliau meletakkan jawatan dalam MBF Finance Bhd. Sekitar tahun 2010, DS ditawarkan jawatan di pejabat Perdana Menteri. Beliau kemudiannya meninggalkan MM & Co cawangan Kuantan dan digantikan oleh responden sebagai rakan kongsi di cawangan Kuantan. Perayu telah dibayar pengeluaran bulanan dari cawangan Kuantan yang berjumlah RM1,000 pada mulanya pada tahun 2002 dan secara beransur-ansur dinaikkan kepada RM4,500 sehingga September 2017. Responden menyampaikan memorandum kepada perayu berserta salinan penyata untung and rugi bagi tahun 2016, menyatakan perayu menerima bayaran melebihi RM39,468.93 berdasarkan agihan untung rugi cawangan Kuantan bagi tahun 2016. Responden kemudiannya menghantar kepada perayu surat memaklumkan pemberhentian pengeluaran bulanan perayu bermula Oktober 2017. Perayu menjawab dengan surat yang menyatakan pegangan 70%-30% seperti yang dipersetujui dalam draf perjanjian perkongsian hanya berkuat kuasa mulai 2017 selepas pelaksanaannya dan membantah pemberhentian unilateral pengeluaran bulanan dan menegaskan 50% bahagian pegangan sahamnya. Responden kemudiannya berhenti membayar pengeluaran perayu pada Oktober 2017 dan oleh itu didakwa telah melanggar syarat perjanjian perkongsian. Ia menyebabkan saman ini difailkan oleh perayu kerana melanggar kontrak. Responden: (a) menafikan bahawa perayu adalah rakan kongsi MM & Co cawangan Kuantan dan menegaskan bahawa responden memiliki 100% ekuiti firma Kuantan; dan (b) mendakwa bahawa beliau dilantik oleh DS yang merupakan rakan kongsi firma Kuantan pada masa itu. HMT dalam menolak tuntutan itu berpendapat bahawa perayu bukan rakan kongsi di MM & Co cawangan Kuantan dan oleh itu, tidak berhak mendapat 50% daripada untung dan rugi. Oleh itu, rayuan ini. B C D E F G H I

Diputuskan, membenarkan rayuan:

(1)Seksyen 6 Akta Had Masa 1953 adalah tidak terpakai kerana saman itu dimulakan kurang daripada setahun selepas kausa tindakan timbul dan menjadi jelas pada 2017. Penemuan HMT adalah salah anggap dengan syarat perjanjian lisan itu wujud apabila

responden dilantik rakan kongsi MM & Co. Pelanggaran yang didakwa oleh responden terhadap terma-terma ini yang menjadi dasar tindakan perayu (lihat perenggan 25).

(2)Perkongsian keuntungan yang melibatkan perayu telah disokong dan dibuktikan dengan keterangan dokumentari yang tidak dipertikaikan. Terdapat keterangan yang jelas, tidak berbelah bahagi dan tidak boleh dipertikaikan mengenai perkongsian perayu dengan kepentingannya (walaupun peratusannya dipertikaikan) di MM & Co cawangan Kuantan. Berdasarkan dokumen sokongan yang dikemukakan oleh perayu, keterangan lisan responden akan kelihatan bercanggah dengan dokumen kontemporari, dalam kes ini, pada dasarnya keterangan dokumentari semasa akan diutamakan. Memandangkan responden telah hadir sebagai pengganti DS, terdapat hubungan perkongsian undang-undang yang mengikat antara perayu dan beliau sehingga perkongsian itu dihentikan bersama. Responden harus dihalang menegaskan ketiadaan kontrak yang didakwa (lihat perenggan 44–46 & 48–49).

(3)Terdapat keterangan yang mencukupi di hadapan mahkamah bawahan bahawa terma-terma aturan antara perayu dan DS dikekalkan sebagaimana yang dibuktikan oleh pembayaran berterusan pengeluaran bulanan kepada perayu yang juga telah dibayar keuntungan bagi tahun 2016. Ia berikutan bahawa responden sebagai rakan kongsi pengganti menggantikan DS sememangnya mengetahui hasil perjanjian antara rakan kongsi sedia ada pada masa itu yang telah bersetuju untuk kewujudan perayu sebagai rakan kongsi yang sama seperti yang dibuktikan oleh penerusan pengeluaran bulanan dan pembayaran keuntungan. Pandangan HMT menyokong keputusannya bahawa tindakan perayu tersasar kerana ia sepatutnya terhadap DS dan bukannya responden adalah salah anggap kerana kausa tindakan hanya terakru atas dakwaan pelanggaran oleh responden apabila beliau memutuskan untuk menamatkan pengeluaran bulanan untuk perayu berkuat kuasa Oktober 2017 pada masa DS tidak lagi menjadi pihak kepada terma-terma aturan antara perayu dan responden yang membolehkan perkongsian di cawangan Kuantan itu kekal (lihat perenggan 54–55).

(4)Pergantungan kepada keterangan PW7 adalah cacat kerana keterangan PW7 pada keseluruhannya tidak konsisten berdasarkan fakta material dan yang lebih penting, beliau telah, mengakui, tidak terlibat dalam hal ehwal cawangan Kuantan mahupun dalam perbincangan antara perayu dan DS mengenai peratusan keuntungan perkongsian. Keterangan responden bahawa PW7 menguruskan cawangan Kuantan selepas DS meninggalkan firma itu adalah bercanggah langsung dengan keterangan PW7 sendiri bahawa dia tidak terlibat dalam cawangan Kuantan. Keterangan beliau mengenai isu yang dipertikaikan secara serius adalah, oleh itu, tidak boleh dipercayai dan tidak patut diberi perhatian. HMT telah gagal menilai secara kritikal dan menghargai aspek material keterangan yang memihak kepada kebenaran penegasan perayu bahawa beliau adalah rakan kongsi MM & Co cawangan Kuantan yang memegang ekuiti 50% dan bukan pembantu undang-undang bergaji seperti didakwa oleh responden (lihat perenggan 56–57 & 60).]

Cases referred to

AB Latef & Associates (M) Sdn Bhd v Govindasamy a/l Suppiah [2016] 5 MLJ 508 ; [2016] 10 CLJ 1, CA (refd)

Boustead Naval Shipyard Sdn Bhd v Dynaforce Corp Sdn Bhd [2015] 1 MLJ 284

; [2014] 5 CLJ 533, CA (refd)
Desa Samudra Sdn Bhd v Bandar Teknik Sdn Bhd & Ors [2012] 1 MLJ 729 ; [2012] 1 CLJ 429, FC (refd)
Deutsche Bank (M) Bhd v MBf Holdings Bhd & Anor [2015] 6 MLJ 310, FC (refd)
Network Pet Products (M) Sdn Bhd v Royal Canin SAS & Anor [2015] 4 MLJ 525, CA (refd)
Tindok Besar Estates Sdn Bhd v Tinjar Co [1979] 2 MLJ 229 ; [1979] 1 LNS 119, FC (refd)
The Great Eastern Life Assurance Co Ltd v Indra Janardhana Menon (representing the estate of the deceased, NVJ Menon) [2006] 2 MLJ 209, FC (refd)

Legislation referred to

Contracts Act 1950 s 2
Evidence Act 1950 s 101(1), (2)
Limitation Act 1953 s 6, 6(1)
Partnership Act 1961 s 4, 4(c)

Appeal from: Civil Suit No CA-22NCvC-20–04 of 2018 (High Court, Kuantan)

Gurdev Singh a/l Kartar Singh (with Ramash Kumar) (Irmohizam, Gurdev & Co) for the appellant.
Wan Azmir Wan Majid (with Hamsagayathri a/p Loghanathan) (Hafarizam Wan & Aisha Mubarak) for the respondent.

Gunalan Muniandy JCA:

INTRODUCTION

[1] Both the appellant and respondent are advocates and solicitors who were at the material time partners in the Kuantan branch of the legal firm, M/s Mohd Mohtar & Co ('MM & Co'). Eventually, disputes arose between the parties concerning a proposed partnership agreement which they could not resolve. It resulted in the present suit being filed by the appellant for breach of contract.

[2] The appeal before us is against the decision of the learned judge of the Kuantan High Court ('LJ') in dismissing the claim after the conclusion of a full trial after hearing the parties' respective witnesses.

A FACTUAL BACKGROUND

[3] The legal firm of MM & Co was incorporated by the founding partner, Hj Mohd Mohtar around 1998. Thereafter, MM & Co opened up branches in Kuantan, Pahang, Kemaman, Terengganu and Kuala Lumpur.
B

[4] The Kuantan branch was established and managed by Dato' Suffian ('DS') who is also the respondent's husband around the year 2000.

C **[5]** The respondent, then, joined the Kuantan branch around the year 2001 as a legal assistant to facilitate the firm's conveyancing matters.

[6] Thereafter, the appellant joined the Kuantan branch around the year 2002 after he resigned from MBF Finance Bhd (currently known as Ambank
D Bhd).

[7] Around the year 2010, DS was offered a position in the Prime Minister's office. He then left the Kuantan branch of MM & Co and was substituted by the respondent as a partner in the Kuantan branch.
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[8] The appellant was paid monthly drawings from the Kuantan branch which amounted to RM1,000 initially in 2002 and was gradually increased to RM4,500 till September 2017.

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[9] The respondent served the appellant a memorandum dated 26 September 2017 sent to the appellant together with a copy of the profit and loss statement for year 2016, stating that the appellant received payment in excess of RM39,468.93 based on the distribution of the profit and loss from the
G Kuantan branch for 2016.

[10] The respondent then sent to the appellant a letter dated 27 October 2017 informing the appellant of the cessation of monthly drawings commencing October 2017.
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[11] The appellant responded with a letter dated stating 2 November 2017 that the 70%–30% stake as agreed in the draft partnership agreement was only effective from 2017 upon its execution and objected to the unilateral cessation
I of the monthly drawings and insisted on his 50% share of the shareholding. There was no rebuttal from the respondent to this position as expressly taken by the appellant.

[12] The respondent then ceased paying the appellant drawings in October 2017 and therefore was alleged to have breached the terms of the partnership agreement.

[13] The appellant filed this suit at the Kuantan High Court on 2 April 2018 and sought, amongst others, these orders:

(a) a declaration that the appellant is a partner of M/s Mohd Mohtar & Co holding a 50% share of the profit and loss of M/s Mohd Mohtar & Co Kuantan branch; and

(b) an order for specific performance for the respondent to serve on the appellant the statement of accounts of M/s Mohd Mohtar & Co Kuantan branch for the years 2010 to 2017 for auditing.

[14] The respondent denies that the appellant was a partner of M/s MM & Co Kuantan branch, and asserts that the respondent owns 100% of the Kuantan firm's equity. The respondent claims that she was appointed by Mohamed Suffian ('DS') who was a partner of the Kuantan firm at the material time.

[15] The LJ had dismissed the appellant's claim against the respondent and held that the appellant is not a partner at M/s MM & Co Kuantan branch and therefore, not entitled to 50% of the profit and loss. Hence, the respondent is not responsible to serve the appellant the statement of account of M/s MM & Co Kuantan branch from 2010 to 2017.

DECISION OF THE HIGH COURT

[16] In summary, the findings made by the LJ are as follows (extracted from the respondent's written submission):

(a) the appellant's cause of action is based on breach of contract and thus it is barred pursuant to s 6 of the Limitation Act 1953 because the Kuantan suit was filed in the year 2018 when the appellant asserted that he became a partner in 2010;

(b) the appellant argued that the agreement between the appellant and Mohamed Suffian is an oral contract. This kind of agreement is so grave that detailing it in a written agreement is a must and not just depend on it orally;

(c) as a lawyer, it is impossible for the appellant as a partner of MM & Co who owned 50% of the loss and profits to not reserve his rights in writing;

(d) the evidence from Hj Mohd Mohtar affirmed that the appellant is the partner for the Kemaman branch whilst the respondent is for Kuantan branch. It was so strong and clear that the appellant's contention is untrue;

(e) even if there was an oral agreement between the appellant and Mohamed Suffian ('DS'), there was nothing in the pleading to show that it binds the respondent;

(f) the respondent is not privy to the said agreement between the appellant and DS. Thus, the claim should be against DS and not the respondent; and

(g) the draft partnership agreement was not agreed upon as well as executed by any of the partners and it was confirmed by Hj Mohd Mohtar himself. Thus, it is not binding on any parties, including the respondent.

[17] For the above reasons, the LJ concluded that the appellant at the material time was not a partner of M/s MM & Co Kuantan branch, and thus, he was not entitled to get a profit of 50% and the respondent is not obligated to provide statement of accounts for the said branch to the appellant from the year 2010 till 2017.

OUR DECISION

[18] We would, first and foremost, state the appellant's grounds for dissatisfaction with the LJ's findings as reflected in his memorandum of appeal. Briefly, it was contended that the LJ had erred in law and fact for these reasons:

[19]

(a) failing to appreciate that s 6 of the Limitation Act ('the LA') is inapplicable here as the alleged breach had occurred in October 2017 and not 2010, and the limitation defence was not even part of the respondent's pleading;

(b) the LJ's finding that there is no oral contract between the appellant and DS without reference to the circumstances, conduct of the parties and contemporaneous documents was wrong in principle;

(c) in holding that the respondent was not privy to the oral agreement between the appellant and DS and was, thus, was not bound by its terms; and

(d) for reliance on Mohd Mohtar's unreliable testimony which is inconsistent and contradictory.

[20] Before us, the threshold issue was whether the appellant's claim filed on

2 April 2018 was statute-barred pursuant to s 6 of the LA 1953. For ease of reference, we would reproduce s 6(1) of the LA as follows:

> (1) Save as hereinafter provided the following actions shall not be brought after the expiration of six years from the date on which the cause of action accrued, that is to say —
>
> (a) actions founded on a contract or on tort;
>
> (b) actions to enforce a recognisance;
>
> (c) actions to enforce an award;
>
> (d) actions to recover any sum recoverable by virtue of any written law other than a penalty or forfeiture or of a sum by way of penalty or forfeiture.

[21] To start with, we would, briefly, state the respondent's position to be as below:

(a) in the case of breach of contract, the cause of action accrued from the date the alleged breach occurred;

(b) in the Kuantan suit, the appellant's pleaded case was that he is entitled to receive 50% of profit-loss sharing in the Kuantan branch as soon as the appellant joined that branch as a partner;

(c) it is pertinent to note that the appellant's pleaded case was that the appellant joined the Kuantan branch in July 2002 and alleged that he did not receive the 50% profit-loss sharing in the Kuantan branch since the year 2000; and

(d) it is the evidence of the appellant himself that he did not receive 50% of profit-loss sharing since the year 2000 during the cross-examination of the appellant.

Reliance was placed on the appellant's own testimony that he will take another action against DS from which it is crystal clear that the appellant himself had impliedly admitted that he had not been paid profit or drawings since the year 2000. From his stance alone, it was said to be implicit that he was not a partner of that branch of the firm.

[22] As the Kuantan branch was established by DS in 2000, the appellant's action filed in 2018 had purportedly lapsed for 12 years. Further, even if for the purpose of limitation time is to be calculated from the date the respondent became a partner in the Kuantan branch in 2010, the appellant's action had lapsed for two years.

[23] Reference was made to the Federal Court case of *The Great Eastern Life Assurance Co Ltd v Indra Janardhana Menon (representing the estate of the deceased, NVJ Menon)* [2006] 2 MLJ 209 where it was held that:

In arriving at that finding, the Court of Appeal has completely rewritten the law of contract governing limitation of actions. Section 6(1)(a) of the Act provides that:

> ... actions founded on a contract shall not be brought after the expiration of six years from the date on which the cause of action accrued.

The law on, when a cause of action accrues is already well settled and very much entrenched in our jurisprudence which is this. A cause of action founded on contract accrues on the date of its breach and that time begins to run from that breach (see the case of *Nasri v Mesah* [1971] 1 MLJ 32 which followed *Board of Trade v Cayzer, Irvine & Co* [1972] AC 610).

And ...

When demand was made by Menon, the appellant refused payment, thereby breaching its obligation to pay and it is at that point of time that time begins to run. Calculating the six-year time bar from 1986 when Menon's cause of action arose until 1993, when Menon filed his claim in court, clearly his claim has become time barred.

[24] On the contrary, the appellant's proposition was that his claim filed on 2 April 2018 was not barred by limitation as alleged on the basis that his cause of action is premised on the respondent's breach of the partnership agreement in 2017 when the respondent unilaterally and wrongfully ceased the 'drawing payments' to the appellant in October 2017, depriving the appellant's 50% share of profits in M/s MM & Co, Kuantan branch.

[25] His position was that he was underpaid profits due to him for 2016 as advised by his accountant. He seeks an account of the firm's earnings for the period 2010–2017 to audit and ascertain the profit and loss during the material period. Hence, the cause of action must have arisen or accrued in October 2017 when the said breach occurred.

[26] We are, with respect, based on the peculiar factual matrix of this case, inclined to accede to the appellant's position that s 6 of the LA was inapplicable in this instance as the suit was commenced less than a year after the cause of action arose and crystallised in 2017. We also agree that the LJ's finding on the issue at hand was misconceived as the terms of the oral agreement subsisted when the respondent was appointed a partner of MM & Co. It was the alleged breach by the respondent of these terms that the appellant's cause of action was predicated upon.

[27] Moving on to the next core issue that arose for determination which was whether there was an agreement between the appellant and DS whereby the appellant is entitled to 50% of profit-loss sharing in the Kuantan branch, the appellant's pleaded case was that the question should be answered in the affirmative. It was alleged that the agreement existed between these two parties

before the establishment of the Kuantan branch while it was admitted that there was no written agreement but only a verbal one. Hence, the respondent, as a succeeding partner of DS was bound by this understanding as agreed upon since the inception of the partnership that subsisted notwithstanding that DS had withdrawn from the partnership.

[28] On this issue in dispute, the respondent stressed that the burden of proof lay on the appellant to prove this particular fact which the appellant asserted to be true (s 101(1) and (2) of the Evidence Act 1950 ('the EA') is referred to).

[29] In a case in point, the Court of Appeal emphasised that:

> The plaintiffs who desire the court to give judgment as to their right or liability, dependent on the facts which they assert in relation to the oral contract bear the burden of proving on a balance of probabilities that they have an oral contract which is binding on the defendant.(*Sang Lee Company Sdn Bhd v Suburamaniam* [2011] 5 MLJ 374).

[30] We would agree that the question as to the existence of an oral agreement is a question of fact that should be answered from a proper evaluation and consideration of all the relevant evidence surrounding this fact in dispute.

[31] The thrust of the respondent's case was that the appellant's assertion as to the existence of the oral agreement that was central to his claim was not supported by any evidence that he had failed to adduce. It was pointed out that in the Kuantan suit, the appellant under cross-examination had agreed that only three people can verify the existence of the alleged agreement who were the appellant, the respondent and DS.

[32] However, it was further pointed out that the respondent, as well as DS had denied the existence of the alleged agreement and, thus, the appellant had nothing else to rely upon but his own bare testimony only and the respondent had nothing to rebut under the circumstances.

[33] There was, purportedly, also nothing else to corroborate the appellant's allegation. Most pertinent was the fact that the founder of MM & Co, Hj Mohd Mohtar, himself did not have any knowledge of the alleged 50:50 profit and loss sharing in the Kuantan branch.

[34] By reference to the material facts before the High Court, particularly the admission of the appellant himself that he did not receive any profit-loss sharing in the Kuantan branch since a certain point in time after which 18 years

had lapsed without any action having been commenced against DS or the respondent, the respondent impressed upon us that the contemporaneous evidence tilted in favour of the non-existence of the alleged agreement. In essence, the position taken was that the arrangement between the partners of MM & Co was straightforward wherein each and every partner of the firm shall be responsible for their respective branches and they shall be entitled to their own profit-loss sharing. Thus, in the instant case, the appellant was to be responsible for the Kemaman branch while the respondent was to be responsible for Kuantan branch respectively.

[35] This version was apparently corroborated by the testimony of a non-interested witness, Hj Mohd Mohtar himself. As such, that the appellant's entitlement was purportedly restricted to the Kemaman branch only and did not extend to the Kuantan branch.

[36] We would at this point state our view on whether the LJ was correct or had erred in finding that the alleged agreement as pleaded did not exist and that even if it existed, did not bind the respondent as it was strictly between the appellant and DS exclusively and did not concern the respondent who was a non-party regardless of the undeniable fact that she had stepped into the shoes of DS to continue the partnership with the appellant.

[37] According to the respondent, the appellant himself had pleaded that the arrangement was between him and DS and parties are bound by their pleadings. Reference was made to the common and crucial concept that to form a contract, there must be an offer and acceptance pursuant to s 2 of the Contracts Act 1950.

[38] We would approach the dispute by determining the question posed by the appellant as to whether a binding partnership agreement existed between the appellant and DS regarding the Kuantan branch with equal stakes.

[39] Whilst it was common ground that there was no written agreement between the parties, we would agree with the appellant that in principle a partnership agreement can exist orally without the formality of an executed agreement premised on the negotiations, factual matrix, exchanges, and the intention of the relevant parties to enter into a legally binding contractual relationship.

[40] In his grounds of judgment ('GOJ') the LJ questioned the existence of an oral agreement between the appellant and DS, and further stated that as a solicitor the appellant ought to have protected his rights with a written agreement to formalise his share in M/s MM & Co.

[41] It was made amply clear in the Federal Court case *Deutsche Bank (M) Bhd v MBf Holdings Bhd & Anor* [2015] 6 MLJ 310 at p 358 that the established principle is this:

> Unless required by law, the formality of an executed agreement is an exception rather than the rule. Where there is no executed agreement, the court will be required to find whether negotiations and exchanges had crystallised into a concluded, albeit informal, contract. Each case must turn on its own facts. 'The established rule is that in interpreting a contract, it is permissible to look at the factual matrix, but the evidence of negotiations and statements of subjective intention must be disregarded. But it is inapplicable when the issue is, instead, one of contract formation. It is likewise inapplicable when rectification is claimed: evidence of negotiations and all other surrounding circumstances will be received' (*Fletcher Challenge Energy Ltd v Electricity Corporation of New Zealand Ltd* per Richardson P, Keith, Blanchard and McGrath JJ). In the case of a complex bargain, it will be more challenging to find the consensus ad idem on the terms. 'The general principle in English law is that all contracts are governed by the same principles; and that the rules for the formation, contents and remedies apply equally to all contracts' (*Contract Law, An Introduction to the English Law of Contract for the Civil Lawyer* by John Cartwright at p 53). Unless required by law, there is no rule that a complex and intricate bargain cannot be concluded by an informal contract.

[42] It was the appellant's contention that he was a partner of MM & Co, Kuantan branch with a 50% stake. Reliance was placed on s 4(c) of the Partnership Act 1961 which provides that the receipt by a person of a share of the profits of business is prima facie evidence that he is a partner in the business.

[43] For good measure we quote from the judgment of a Court of Appeal case which is squarely in point, *Network Pet Products (M) Sdn Bhd v Royal Canin SAS & Anor* [2015] 4 MLJ 525:

> It is also an accepted proposition in law that in assessing whether a partnership exists, the court has to consider the intention of the parties, and in the absence of a written agreement, reliance has to be placed on the provisions of the Partnership Act 1961: *Martin Mairin Idang v Rakanan Jaya Sdn Bhd & Anor* [2011] 6 MLRH 118 *Chua Ka Seng v Boonchai Sompolpong* [1993] 1 SLR 482 (a Singapore, decision, referred to in *Martin Mairin Idang*). The sharing of profits, in the context of a partnership, is a very relevant *indicia*, and this is recognised in s 4 of the Partnership Act 1961. The decision of this court in *SBS Exporters Sdn Bhd & Anor v Tampin Rubber Furniture Industry Sdn Bhd & Ors* [2010] 15 MLRH 315, that recognised the importance of this *indicia*, was cited before us to buttress this point.

[44] On the facts, it was indisputable that the appellant was paid drawings from the Kuantan branch at RM1,000 monthly initially in year 2002 which was gradually increased to RM4,500 monthly until September 2017 after which it was abruptly and unilaterally discontinued by the respondent. It was

a departure from the existing arrangement and understanding on profit and loss sharing that persisted from the setting up of the partnership until the said discontinuation.

[45] We are satisfied that the sharing of profits involving the appellant was supported and evidenced by undisputed documentary evidence, amongst others, the office memo dated 26 September 2017, the profit and loss statement for year 2016 and the tax computation for year of assessment 2016.

[46] We agree with the appellant that there was clear, unequivocal and incontrovertible evidence regarding the appellant's partnership with his stake (though the percentage is disputed) at M/s MM & Co Kuantan branch.

[47] Our view is in accord with the appellant's contention that in light of the documents in support that he tendered, the respondent's oral evidence would appear to be in conflict with the contemporaneous documents, in which case, in principle the contemporaneous documentary evidence would take precedence. On this point, which is crucial to the resolution of the present issue in dispute, the applicable principle was enunciated in the landmark case of *Tindok Besar Estates Sdn Bhd v Tinjar Co* [1979] 2 MLJ 229; [1979] 1 LNS 119 in these words:

> Nevertheless, the learned trial judge expressed himself to be completely satisfied with the veracity of the respondent's witness and their evidence. He purported to come to certain findings of fact on the oral evidence but did not notice or consider that the respondent's oral evidence openly clashed with its contemporaneous documentary evidence. For myself, I rely on the acts and deeds of a witness which are contemporaneous with the event and to draw the reasonable inferences from them than to believe his subsequent recollection or version of it, particularly if he is a witness with a purpose of his own to serve and if it did not account for the statements in his documents and writings. Judicial perception of the evidence requires that the oral evidence be critically tested against the whole of the other evidence and the circumstances of the case. Plausibility should never be mistaken for veracity.

[48] We have also noted the presence of a letter from MM & Co Kuantan branch dated 27 October 2017 addressed to the appellant confirming the appellant as partner with monthly drawings/profit sharing. The appellant responded with his letter of 2 November 2017 that the 70:30 stake as agreed in the draft partnership agreement was only effective from 2017 upon its execution.

[49] It also surfaced that when the appellant objected to the cessation of the monthly drawings as allegedly agreed upon, there was no reply or rebuttal from the respondent. It lent credence to the appellant's position, which was

supported by unequivocal documentary evidence that he was at all material times, recognized as an equal profit sharing partner of the firm at the Kuantan branch. Under the circumstances, as the respondent had come on board as a replacement for DS, there was a binding legal partnership relationship between the appellant and her until mutual cessation of the partnership. The existence of an equal partnership could not be doubted. Substantial evidential support for the appellant's version came from corroborative evidence adduced through legal assistants serving at the material time at the MM & Co Kuantan branch. They confirmed that the appellant was then regarded as a partner of the firm in their professional dealings with him.

[50] In view of the overwhelming contemporary evidence in support of the existence of a legally binding relationship between the appellant and the respondent, we would agree that the latter should be estopped from now belatedly asserting the non-existence of the alleged contract (see *Desa Samudra Sdn Bhd v Bandar Teknik Sdn Bhd & Ors* [2012] 1 MLJ 729; [2012] 1 CLJ 429).

[51] We must reiterate that the probative value of contemporary documentary evidence cannot be overstated and it is incumbent upon the court to undertake a critical evaluation of the sworn evidence that has been adduced to determine its truth. We are convinced that the LJ had failed to carry out such an exercise properly and adequately which led to a finding that was obviously flawed (see *AB Latef & Associates (M) Sdn Bhd v Govindasamy a/l Suppiah* [2016] 5 MLJ 508; [2016] 10 CLJ 1).

[52] We would, lastly, deliberate on the vital finding by the LJ that as the respondent was not privy to the oral agreement between the appellant and DS, hence, the oral agreement was not legally binding on the respondent. In short, the LJ's decision on this point was that even if a subsisting oral agreement exists between the appellant and DS, there is nothing in the pleadings that showed that it was binding on the respondent as the latter was not privy to the oral agreement.

[53] For convenience, we would reproduce the material parts of the appellant's pleading (paras 18–20) as to the events surrounding the appointment of the respondent as a partner of MM & Co to replace DS. It was pleaded that DS proposed to the appellant that M/s MM & Co appoint the respondent to replace DS as a partner of the Kuantan firm whilst maintaining the original agreement pertaining to the agreed 50:50 share of profit and loss of the Kuantan firm, wherein DS's 50% share be transferred to the respondent. In her defence, the respondent made a bare denial of these averments.

[54] Also pleaded were the following:

A (a) the appellant agreed to the above proposal and conveyed the same to Hj Mohtar, the founding partner of MM & Co;

(b) the appellant and Hj Mohtar agreed to the respondent's appointment as a partner of the firm to manage the Kuantan branch in place of DS and all terms pertaining to the sharing and profit and loss between the two partners are to be maintained; and

B

(c) the respondent's appointment as evidenced by MM & Co's letter dated 29 April 2010 to the Bar Council as partner was to manage the Kuantan branch effective 1 March 2010.

C

[55] There was, in our view, ample evidence before the court below that the terms of arrangement between the appellant and DS was maintained as evidenced by the continued payment of monthly drawings to the appellant who was also paid profits for the year 2016 as evidenced by the memo referred to. It followed that the respondent as the succeeding partner in place of DS was indeed privy to the outcome of the agreement between the then existing partners who had agreed to the subsistence of the appellant as an equal partner as evidenced by the continuation of the monthly drawings and payment of profits.

D

E

[56] It was the LJ's view in support of his decision that the appellant's action was misplaced because it ought to be against DS and not the respondent. This view was, to our minds, misconceived as the cause of action only accrued upon the alleged breach by the respondent when she decided to terminate the monthly drawings to the appellants effective October 2017 at which time DS was no longer a party to the then prevailing terms of arrangement between the appellant and the respondent that enabled the partnership at the Kuantan branch to subsist.

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[57] Amongst others, the LJ relied on the testimony of PW7 (Hj Mohd Mohtar), the founding partner of MM & Co in adopting the version of the respondent as against the evidence of the appellant who was a partner of the Kuantan branch since its inception. The said reliance on PW7's testimony was flawed as PW7's testimony was on the whole incoherent on material facts and more importantly, he was, admittedly, not involved in the affairs of this branch nor in the discussions between the appellant and DS on the profit sharing percentage.

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I

[58] PW7 admitted that he managed the Malacca branch of MM & Co and played no role in respect of the other branches such as the Kuantan branch in which he took no interest. Hence, the respondent's testimony that PW7 managed this branch after DS left the firm was, as pointed out by the appellant, in direct contradiction with the testimony of PW7 himself that he was not

involved in the Kuantan branch. His evidence on the issue at hand which was seriously disputed was, thus, unreliable and not worthy of much weight.

[59] We would not touch in detail on DS ('DW2')'s testimony except to emphasize that the Kuantan branch was set up at the suggestion and behest of the appellant, who for that purpose introduced DW2 to PW7. It came into existence as the appellant was then a man of means, having been the Regional Manager of MBF Finance (later Ambank Bhd) whereas DS was not in a similar position. As rightly stressed by the appellant it was not credible for him to have joined MM & Co as a mere legal assistant considering his financial status then.

[60] From the events that transpired surrounding the setting up of the Kuantan branch, and the evidence of witnesses called by both parties, there was only one reasonable conclusion that the LJ should rightly have reached on a balance of probabilities upon proper judicial appreciation of the evidence in its totality, namely, that PW7 was a 100% equity owner of the Malacca branch whereas at the material time (2002) the firm had only one other branch, ie, the Kuantan branch, in which there was a mutual understanding and agreement that both DW2 and the appellant had an equal (50:50) equity in the said branch.

[61] On the whole, in our judgment, the LJ had failed to critically evaluate and appreciate material aspects of the evidence that tilted in favour of the truth of the appellant's assertion that he was a partner of the Kuantan branch of MM & Co holding a 50% equity and not a salaried legal assistant as claimed by the respondent. The latter's allegation was plainly in conflict with the undisputed documentary evidence, which, amongst others, disclosed payments of monthly drawings to the appellant. Where a conflict of evidence situation arises in a civil action, the LJ should rightly have turned to neutral evidence in resolving the conflict and not placed undue reliance on the unsupported version of the respondent that lacked credibility on the core issue of the appellant's status in the branch at the material time.

[62] Before we conclude, we must stress that we have not lost sight of the trite principle on the application of the doctrine of privity of contract under which the long established rule is that only parties to a contract incur rights and obligations under it. Reference need only be made to the case of *Boustead Naval Shipyard Sdn Bhd v Dynaforce Corp Sdn Bhd* [2015] 1 MLJ 284; [2014] 5 CLJ 533 where the Court of Appeal, inter alia, held that:

> As an established principle of contract law, the common law doctrine of privity of contract stands for the simple proposition that, 'no one but the parties to a contract can be bound by it or entitled under it' (*Greenwood Shopping Plaza Limited v Robert Walker Beattie and Roy Vincent Pettipas* [1980] 2 SCR 228, at p 229).

A CONCLUSION

[63] Premised on the foregoing, we are constrained to disagree with the respondent's contention that the LJ's decision was correct in law and fact in dismissing the appellant's claim on the following grounds:

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(a) the appellant's action against the respondent which was premised on a breach of contract has lapsed and is time-barred;

(b) the appellant bears the burden of proof to demonstrate to the court the existence of the said alleged agreement which the appellant had indeed failed to prove on a balance of probabilities;

C

(c) even if there was in existence the said alleged agreement, it was only between the appellant and DS, there was nothing to show the existence of a valid and an enforceable agreement between the appellant and the respondent; and

D

(d) the respondent is a stranger to any dealing between the appellant and DS and is not privy to it.

E **[64]** We would conclude that, the LJ, with respect had misdirected himself in arriving at his finding of fact and decision against the weight of evidence. It resulted from a failure to sufficiently and critically evaluate the documentary evidence that was unequivocal and the witnesses' testimonies in the light of the materially conflicting versions on the crucial partnership and profit-sharing issues.

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[65] Our judgment, therefore, is that the LJ was plainly wrong in his decision for his failure to consider and sufficiently appreciate the evidence as a whole. There are in our considered views, sufficient merits in this appeal to warrant appellate interference to correct the plain errors in the decision of the LJ

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[66] We, accordingly, allow this appeal and set aside the decision of the LJ. Following the setting aside of the High Court's decision, we therefore enter judgment in favour of the appellant as per the reliefs claimed by the appellant in para 53(a) to (k) of his statement of claim.

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[67] Lastly, we also order that the respondent (defendant) to be liable to pay costs of RM35,000 to the appellant (plaintiff) here and below, subject to allocator.

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Appeal allowed.

Reported by Ahmad Ismail